Editor's note: Modified – See James W. Smith (On reconsideration), 55 IBLA 390 (June 30, 1981)

WESTERN AGGREGATES OF MINERAL & ROCK, INC.

IBLA 77-421 Decided March 14, 1978

Appeal from decision of Wyoming State Office, Bureau of Land management terminating right-of-way W-0256456.

Vacated and remanded.

1. Administrative Procedure: Adjudication--Federal Land Policy and Management Act of 1976: Rights-of-Way--Hearings: Generally--Rights-of-Way: Act of January 21, 1895--Rights-of-Way: Cancellation

   Although a right-of-way granted under the Act of January 21, 1895, was previously subject to cancellation by the authorized officer for non-use pursuant to 43 CFR 2802.2-3, the Federal Land Policy and Management Act of 1976 provides that suspension or termination of a right-of-way requires an appropriate administrative proceeding pursuant to 5 U.S.C. § 554 (1970), except where the right-of-way provides by its terms that it will terminate in such event.

2. Rights-of-Way: Act of January 21, 1895--Rights-of-Way: Nature of Interest Granted

   A right-of-way issued pursuant to the Act of January 21, 1895, gives the holder thereof an exclusive right of user.

APPEARANCES: Robert C. LeFaivre, President and General Manager, Western Aggregates of Mineral and Rock, Inc.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Western Aggregates of Mineral and Rock, Inc. (Western), appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated May 12, 1977, holding that its right-of-way

W-0256456, filed pursuant to the Act of January 21, 1895, 43 U.S.C. § 956 (1970), terminated because of nonuse.

The right-of-way which crosses public land in sec. 16, T. 18 N., R. 106 W., sixth principal meridian, Sweetwater County, Wyoming, was granted on June 5, 1963, for a "road for mining purposes." In its application of August 10, 1962, Western stated that it wanted the road for the purpose of developing a construction materials deposit of sand and gravel on the property of the Union Pacific Railroad located in adjoining sec. 9. BLM, alleging that Western was no longer engaged in a construction materials mining operation, issued an Order to Show Cause why BLM should not render a decision declaring that the right-of-way had terminated for nonuse.

Western responded on April 27, 1977, stating that the right-of-way had been renewed in 1973 for a 20-year period and rental had been paid and accepted in accordance with the renewal. It complains, in effect, that others "have used and now use the right-of-way for access in pursuit of minerals development and related enterprise therefrom have been and are in violation. Gain has been and is at the expense of the grantee." In its Response, Western also asserted that, "Matters concerning arbitration are in accordance with State law and/or rules appropriately obtaining of the American Arbitration Association," and charged that, "Any act of cancellation by decision will be held as an act designed to protect competition which has established a public record of violation of use of right-of-way. Fair trade laws and those pertaining to interstate commerce will be brought into play."

In its decision, the State Office found that Western had failed to demonstrate that it was continuing to mine construction materials from adjacent private land as recited in its application, or that it was engaged in any other mining operation for which the right-of-way is still needed. BLM concluded that the charge contained in the Show Cause Order is deemed to have been admitted and held that the right-of-way terminated because of nonuse. It also said that the State arbitration procedure, the rules of the American Arbitration Association, the fair trade laws and the laws pertaining to interstate commerce were not applicable to this matter. It stated that the unearned portion of Western's advance rental would be refunded.

In its appeal from that decision Western reiterates its argument that it has a vested interest in the right-of-way through June 4, 1993, by reason of the extension granted in 1973 and BLM's acceptance of payment of the advance rental for that period. Appellant further alleges that the right-of-way "services Mill Site for reduction works [sic] at a distance from said works," but offers no other details or elaboration. It is also alleged that the right-of-way "provides access to mining claims which are in process of being registered."

The facts are that in 1963 appellant's predecessor, a partnership, held the right to remove sand and gravel from certain privately owned land and, at some distance, a federal small tract lease on public domain land. The subject right-of-way was granted for a road between the sand and gravel pit and the small tract business lease. The small tract lease was cancelled and, apparently, appellant then located a mill site on the same land. See Western Aggregates of Mineral & Rock, Inc., 7 IBLA 338 (1972). In 1973 the right-of-way was reappraised and renewed for a period of 20 years. Subsequently, according to the record, the ownership of the gravel pit "changed hands," and it is now owned and operated by Fryburger Sand and Gravel, Inc., which has been using the right-of-way and the road constructed by appellant over appellant's objections.

[1] Previously, rights-of-way granted pursuant to the Act of January 21, 1895, as this one was, were subject to cancellation by the authorized officer for nonuse pursuant to 43 CFR 2802.2-3. However, the Federal Land Policy and Management Act of 1976 (FLPMA) 1/, which repealed the 1895 statute, provides at section 506 that suspension or termination of a right-of-way for cause requires an appropriate administrative proceeding pursuant to 5 U.S.C. § 554 (1976). FLPMA also provides that the holder of the right-of-way must be given written notice of the grounds for such action and have reasonable opportunity to resume use or otherwise comply with the subject requirement before the commencement of any action. A proceeding pursuant to 5 U.S.C. § 554 requires that the party be given written notice and an opportunity for a hearing.

FLPMA further states that no administrative proceeding shall be required if the right-of-way is one which by its terms provides that it terminates on the occurence of a fixed or agreed upon condition, event, or time. The subject right-of-way does not fall into this category. The decision appealed from states that because of appellant's nonuse "the right-of-way has expired by its own terms," but we are unable to agree. Although pursuant to 43 CFR 2802.2-3 the right-of-way, prior to FLPMA, could have been canceled by the authorized officer for nonuse, there is nothing in the terms of the grant which provide that the grant will terminate for nonuse. Cancellation was a matter within the discretion of the authorized officer, and is not mandated by the terms of the right-of-way in this instance.

[2] The 1895 Act, under which appellant holds this right-of-way, grants the holder an exclusive right of user. Solicitor's Opinion, M-36584, 66 I.D. 361, 364-65 (1959). It is not alleged that any BLM employee has authorized the use of this right-of-way

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1/ P.L. 94-579, 90 Stat. 2743, 43 U.S.C. 1701 (1976).

by others. Moreover, it is not the responsibility of BLM to police appellant's relationships with third parties. If appellant desires to abate the alleged wrongful use of the right-of-way by others he may seek such recourse as is legally available to him.

In the concurring opinion by Judge Goss he observes that the supplemental appraisal report takes note of the public use of the road. The fact that the appraiser considered and reported use of the road by the public, has, in our opinion, nothing whatever to do with whether such use is lawful. Moreover, in his recitation of 43 CFR 2801.1-5 we believe that Judge Goss has mis-placed the emphasis. The critical language of that regulation is underscored below:

> (1) That the allowance of the right-of-way shall be subject to the express condition that the exercise thereof will not unduly interfere with the management, administration, or disposal by the United States of the lands affected thereby, and that he agrees and consents to the occupancy and use by the United States, its grantees, permittees, or lessees of any part of the right-of-way not actually occupied or required by the project, or the full and safe utilization thereof, for necessary operations incident to such management, administration, or disposal. [Emphasis added.]

Quite obviously, the holder of the right-of-way is obliged by the foregoing to allow use and occupancy of only that portion of the land which is not used or needed for "the project," which in this instance is the road. It follows, therefore, that he is not obliged to consent to the use or occupancy of the land which is "actually occupied or required by the project." Thus, his use of the road is exclusive.

Finally, we regard Judge Goss' invocation of 43 U.S.C. § 1763 to be irrelevant, as this is not a designated transportation or utility corridor under the Act, and the Secretary has not promulgated any regulations which would alter the rights of the grantee of this right-of-way to the exclusive use of the roadway.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decision appealed from is vacated and the case is remanded to the Wyoming State Office, BLM, for further action consistent herewith.

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Edward W. Stuebing
Administrative Judge

I concur:

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Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

While I concur in the result, I do not feel it is necessary to reach the question of whether the right-of-way is exclusive under the Right-of-Way Act of 1895, 43 U.S.C. § 956 (1970), repealed in 1976 subject to a savings clause. Federal Land Management and Policy Act (FLPMA), section 706(a), 90 Stat. 2793. The right-of-way was granted on June 5, 1963, to expire at an indefinite period. On January 4, 1973, the rental period was fixed at 20 years and on the basis of a reappraisal the rental fee was set at $110. The record contains a "Supplemental Report to WYOMING Master Right-of-Way Appraisal," in which the right-of-way was appraised as nonexclusive:

> 109.76 = $110.00 (Advance lump sum rental for 20 years)
>
> Note: Due to public use of the road the rental rate is reduced from 95% of fee to 75% of fee.

The record does not show whether any other person has formally applied for use of the right-of-way. The right-of-way was granted subject to 43 CFR 2801.1-5, formerly 43 CFR 244.9(1) (1954), which provides in part:

> (1) That the allowance of the right-of-way shall be subject to the express condition that the exercise thereof will not unduly interfere with the management, administration, or disposal by the United States of the lands affected thereby, and that he agrees and consents to the occupancy and use by the United States, its grantees, permittees, or lessees of any part of the right-of-way not actually occupied or required by the project, or the full and safe utilization thereof, for necessary operations incident to such management, administration, or disposal. [Emphasis added.]

Under the first condition of the above regulation and the Land Policy and Management Act, 43 U.S.C. § 1763 (West. Supp. 1977), there is a question as to whether a right-of-way granted under the above condition should now be deemed exclusive. Section 1763 sets forth the national policy:

> In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secretary concerned the right to grant additional rights-of-way or permits for compatible

> uses on or adjacent to rights-of-way granted pursuant to this Act. In designating right-of-way corridors and in determining whether to require that rights-of-way be confined to them, the Secretary concerned shall take into consideration national and State land use policies, environmental quality, economic efficiency, national security, safety, and good engineering and technological practices. The Secretary concerned shall issue regulations containing the criteria and procedures he will use in designating such corridors. Any existing transportation and utility corridors may be designated as transportation and utility corridors pursuant to this subsection without further review. [Emphasis added.]

It is possible that an exclusive right-of-way could be deemed to unduly interfere with the management and administration of the land under FLPMA.

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Joseph W. Goss
Administrative Judge